

**J.K., Appellant**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Boston, MA, Employer**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

### Case Submitted on the Record

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

On March 1, 2011 appellant filed a timely appeal from the September 3, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision.

The issue is whether OWCP properly denied appellant's May 21, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

On October 2, 1998 appellant, a 35-year-old medical administration services clerk, filed a claim for workers' compensation benefits alleging an exacerbation of irritable bowel syndrome

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

and anxiety.<sup>2</sup> OWCP accepted her claim for a brief single episode of aggravation of preexisting irritable bowel syndrome lasting no longer than July 17, 1998. In a decision dated September 28, 1999, it found that the episode caused no disability for work. OWCP also found that the weight of the medical evidence established that appellant's psychiatric condition and the continuing aggravation of her irritable bowel syndrome were not causally related to compensable factors of employment.

In a decision dated July 31, 2000, a hearing representative affirmed the decision. The hearing representative reviewed appellant's allegations of harassment and discrimination and explained why most were not accepted employment factors. Three incidents were established as compensable, and the matter was referred to medical specialists for an opinion on causal relationship and disability. The hearing representative found that the medical opinion evidence did not establish that appellant continued to have residuals of the accepted work injury or that her emotional condition was due to the accepted employment factors. The hearing representative affirmed OWCP's September 28, 1999 decision because appellant "has not submitted any detailed rationalized medical evidence to support that her emotional condition is due to the accepted employment factors or that she continues to suffer residuals of the accepted work injury."

This decision is the last merit review of appellant's case. The decision notified appellant that, if she had additional evidence, not previously considered, which she believed was pertinent, she had one year from the date of the decision to request reconsideration.<sup>3</sup>

On May 21, 2010 appellant requested reconsideration. She stated that in the spring of 2007 OWCP took steps to protect her privacy, which suggested to her that a violation of her right to privacy as well as claim adjudication errors may have taken place. Appellant stated that the claims examiner noted in his decision that he may be in error in accepting a nondisabling aggravation. She did not believe it was appropriate for an OWCP-selected doctor to provide a report relevant to how the distance from the work area to the bathroom would enable her to return to gainful employment while bullying, work torment, false rumors and other forms of unacceptable behavior continued. Appellant also stated that the veterans found she was not treated right and contacted the Senate to inform them of the vile behaviors directed to her.

Appellant added that the second-opinion physician's comments on her sex or sexual identity encouraged and gave permission to the unacceptable behaviors. She stated that her rights to patient privacy were broken: the second-opinion physician suggested a wide variety of anti-depressants, which could have been avoided. Appellant noted her indebtedness to the Federal Government, to the amount of \$193,000.00 and inquired about some form of relief. She stated that OWCP's action in 2007 "went well beyond the one year time deadline for reconsideration," which suggested to her that options to reconsider payment relief may still exist.

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<sup>2</sup> OWCP accepted as established compensable factors incidents occurring on December 12, 1997 (interaction with a physician), March 6, 1998 (interaction with an admitting clerk) and July 17, 1998 (overheard repeated profanity).

<sup>3</sup> By decision dated November 1, 2002, the Board affirmed an April 10, 2001 OWCP decision, finding that it properly refused to reopen appellant's case for further merit review. Docket No. 02-161 (issued November 1, 2002).

In a decision dated September 3, 2010, OWCP denied appellant's May 21, 2010 request for reconsideration. It found that the request was untimely and failed to present clear evidence of error in the hearing representative's July 31, 2000 merit decision.

On appeal, appellant submits a copy of the memorandum her representative submitted to the Board in 2002, when the Board found that OWCP properly denied an earlier request for reconsideration.<sup>4</sup>

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may –

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."<sup>5</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>6</sup>

The term "clear evidence of error" is intended to represent a difficult standard.<sup>7</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>8</sup>

### **ANALYSIS**

OWCP's most recent merit decision is the hearing representative's July 31, 2000 decision affirming the limited acceptance of appellant's claim. Appellant had one calendar year, or until

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<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

<sup>8</sup> *Id.* at Chapter 2.1602.3.d(1).

July 31, 2001, to request reconsideration. Her May 21, 2010 request was nearly nine years late and is untimely.

The question for determination is whether appellant's untimely request showed clear evidence of error in the hearing representative's July 31, 2000 decision. In that decision, the hearing representative reviewed appellant's allegations and explained why they were not accepted as compensable. She reviewed the medical opinion evidence and found nothing to support that appellant continued to suffer residuals of the accepted work injury or that her emotional condition was due to the accepted employment factors. The hearing representative affirmed OWCP's September 28, 1999 decision because appellant "has not submitted any detailed rationalized medical evidence to support that her emotional condition is due to the accepted employment factors or that she continues to suffer residuals of the accepted work injury."

To obtain a merit review of her case, appellant's untimely request must show, on its face, that this decision was clearly erroneous. The Board has reviewed appellant's request and finds that it did not meet this difficult standard of review. Appellant's request consisted of a narrative statement, one in which she provided her perspective on such matters as privacy rights, disability and the appropriateness of the medical evidence. Her statements were vague and speculative, and they were immaterial or irrelevant to the hearing representative's decision. For instance, appellant noted that OWCP took some action in the spring of 2007 to protect her privacy, but she did not explain what that action was.<sup>9</sup> Regardless, it suggested to her that some violation of her privacy rights as well as claim adjudication errors may have taken place. Appellant did not explain why the unknown action suggested this, and she did not identify the nature of the adjudication errors. She speculated that she would suffer future injury if she returned to work. Appellant stated that "the veterans" found she was not treated right, but she did not explain who the veterans were or what specific treatment or vile behaviors they had brought to the Senate's attention or how this showed that the hearing representative's decision was clearly erroneous.

The Board has read OWCP's September 28, 1999 decision and can find no admission by the claims examiner that he might be in error in accepting a non-disabling aggravation. It appears instead that the claims examiner carefully evaluated the medical evidence before unequivocally recommending that the claim be accepted for a brief episode of non-disabling aggravation. Appellant also raised the issue of her indebtedness to the Federal Government, which is wholly irrelevant to the issues decided on July 31, 2000.

Because appellant's untimely request for reconsideration does not show clear evidence of error in OWCP's most recent merit decision, the Board finds that OWCP properly denied her request. The Board will affirm OWCP's September 3, 2010 decision.

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<sup>9</sup> If OWCP took steps in 2007 to protect her privacy, or the privacy of claimants in general, such action did not extend the one-year period for requesting reconsideration. The one-year period began to run when the hearing representative issued her July 31, 2000 merit decision, and it ended on July 31, 2001. Since that time, OWCP has not issued a merit decision that would provide appellant with fresh appeal rights and another year to request reconsideration.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's May 21, 2010 request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 3, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board